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No. 99-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

COLUMBIA FALLS ALUMINUM CORP., ELF ATOCHEM NORTH AMERICA, INC., GOLDENDALE ALUMINUM CORP. (F/K/A COLUMBIA ALUMINUM CORP.), KAISER ALUMINUM & CHEMICAL CORP., NORTHWEST ALUMINUM CO., REYNOLDS METALS CO., VANALCO, INC.,

Petitioners,

-- against --

ADMINISTRATOR, BONNEVILLE POWER ADMINISTRATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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November 18, 1999

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QUESTIONS PRESENTED FOR REVIEW

1. May courts treat political intervention in Endangered Species Act decisionmaking as irrelevant, evaluating the resulting decisions on the basis of a fictitious and incomplete administrative record that does not disclose the intervention?

2. May courts treat disputes of scientific fact in Endangered Species Act litigation against federal agencies as beyond the scope of judicial review, allowing "scientific" agency findings to stand though refuted by empirical data?

3. May agencies reasonably construe § 7 of the Endangered Species Act to forbid federal action with *de minimis* or even positive effects upon listed "species" merely because the "species" is deemed unlikely to recover?

4. Can action agencies lawfully defer to biological opinions and recommendations for "reasonable and prudent alternative action" issued pursuant to the Endangered Species Act when they find those opinions and recommendations to be erroneous?

PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES OF THE PETITIONERS

Petitioners Columbia Falls Aluminum Corp., Elf Atochem North America, Inc., Goldendale Aluminum Corp. (f/k/a Columbia Aluminum Corp.), Kaiser Aluminum & Chemical Corp., Northwest Aluminum Co., Reynolds Metals Co., and Vanalco, Inc. state that their parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates, if any include:

Maxxam, Inc.
Kaiser Aluminum Corp.
Kaiser Aluminum & Chemical Corp.
Societe Nationale Elf Aquitaine
Pechiney Reynolds Quebec, Inc.
Aluminerie De Becancour Inc.
Becancour Joint Venture
Eskimo Pie Corporation
Eskimo Europ, S.a.r.l.
Industrias Lacteas Del Yocoima, S.A.
New Eastwick Corporation
Boddington Housing Pty Ltd.
Worsley Alumina Pty Ltd.
Worsley Joint Venture
Boddington Gold Mines Mountgivson Joint Venture
Mt. Gibson Manager Pty Ltd.
Mineracao Rio Do Norte S.A.
Manicouagan Power Company
Reynolds-Lemmerz Industries
Aluminum-Oxide-Gemeinschaft Stade Aluminum Oxide Stage GMBH
HALCO (Mining) Inc.
Volta Aluminum Company Ltd.
Latas De Aluminio, S.A. – Latasa
Aluminio Reynolds Santo Domingo, S.A.
Procesamiento De Datos, S.A.
Union Industrial Y Astilleros Barranquilla "Unial" S.A.
Aleurope S.A.
Reynolds Aluminum France
Fata European Group S.r.l.
Industria Navarra Del Aluminio, S.A.
Industrias Del Lacado, S.A. (Indulacsa)
Industrias Gomariz, S.A. (Ingosa)
Alumino Reynolds Del Peru Sociedad Anonama
Reynolds Philippine Corp.

Aluminum Corporation of the Phillipines
C.V.G. Alumino Del Caroni, S.A.
Asociacion Venezolana De Adiestramiento Y Desarrolio Del Aluminio (Avadal)
Ruedas De. Aluminio C.A. "Rualca"
Venezolana De. Aleaciones, S.A. "Valsa"
Reymit Aluminum, S.A.
Albev Trading, Inc.
Aroaima Bauxite Company, Ltd.
Aroaima Mining Company, Ltd.
Egyptian Aluminium Products Co.
Iranian Aluminium Co.
Superenvases Envalic, C.A.
Sayanal

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Goldendale Aluminum Company, Columbia Falls Aluminum Company, Elf Atochem North America, Inc., Kaiser Aluminum & Chemical Corporation, Northwest Aluminum Company, Reynolds Metals Company and Vanalco, Inc., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 10, 1999.

The overarching issue presented in this case is whether mere invocation of the Endangered Species Act (or any other statute protecting an important public interest) excuses a federal agency from relying upon valid evidence and offering a reasonable explanation of how its decision comports with law. To the contrary, the more important the public interest being protected, the more important it is that the agency pursue that interest based on relevant facts, in a fashion that is not arbitrary, capricious and contrary to law.

Opinions Below

The decision of the Ninth Circuit sought to be reviewed is reported at 175 F.3d 1156 (9th Cir. 1999), and is printed in the Appendix at pages 1a-12a (cited hereafter as "App. "). The unpublished order denying petitioners' motion to complete the administrative record is printed in the Appendix at pages 14a-15a.

The Record of Decision (ROD) of the Bonneville Power Administration (BPA) challenged through direct review in the Ninth Circuit is printed in the Appendix at pages 16a to 39a.

Jurisdiction

BPA issued its ROD on March 10, 1995. On June 8, 1995, petitioners timely sought review in the Ninth Circuit, which had jurisdiction pursuant to 16 U.S.C. § 839f(e)(5).[1]

Petitioners appeal from a judgment of the Ninth Circuit entered on May 10, 1999, denying their petition for review of BPA's March 10, 1995 Record of Decision, and order of the Ninth Circuit denying rehearing, entered on August 20, 1999. Jurisdiction is conferred by 28 U.S.C. § 1254(1).

Statutes and Regulations Involved

The statutory and regulatory provisions involved are § 7(a)-(b) of the Endangered Species Act, 16 U.S.C. §§ 1536(a)-(b), § 5 of the Flood Control Act of 1944, 16 U.S.C § 825s, § 2(b) of the Bonneville Project Act, 16 U.S.C. § 832a(b), § 2 of the Pacific Northwest Electric Power Planning and Conservation Act, § 16 USC § 839, and 50 C.F.R. § 402.02. The text of those statutory and regulatory provisions is set forth in the Appendix at pages 41a to 47a.

Concise Statement of the Case

The United States Court of Appeals for the Ninth Circuit, the largest of the thirteen federal circuits, has for the last decade stood in review over the most rapid escalation of federal authority since Reconstruction, as dozens of "distinct population segments" of fish have been listed in the Pacific Northwest under the federal Endangered Species Act. No species, or even subspecies, of fish is at any risk of extinction; rather, officials of the National Marine Fisheries Service and the U.S. Fish and Wildlife Service have used Congressional authority to list populations of much larger biological species throughout the Pacific Northwest.[2]

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[1] This statute creates exclusive Ninth Circuit jurisdiction for review of most decisions of BPA; because the petition raised Endangered Species Act issues, petitioners also gave sixty-days notice pursuant to 16 U.S.C. § 1540(g).

[2] Three of dozens of listings are here relevant: 57 Fed. Reg. 14,653 (April 22, 1992) (Snake River spring/summer and fall chinook); 56 Fed. Reg. 58,619 (Nov. 20, 1991) (Snake River sockeye).

There is scarcely a body of water in the Pacific Northwest, or a project with any remote connection to water, that is not now subject to federal regulatory control under the Endangered Species Act. That control is being exercised to regulate virtually all activities that involve use of natural resources near water, shutting down farmers' irrigation[3] and paralyzing future development—the oft-stated purpose of those who invoke the Act.

Petitioners, as customers of the Bonneville Power Administration, are the victims of one of the many increasingly bizarre[4] and rapidly expanding implementations of the Endangered Species Act, one that taxes them and other electric ratepayers roughly $500 million per year in order to attempt to manufacture salmon for capture and sale by commercial salmon interests. Indeed, the administrative record confirms that BPA is spending up to $10 million per salmon (ER40 at 1)[5] to generate fish that are sold for pennies per pound by Northwest fishermen.[6] Believing that the harvest-driven program serves neither their interest nor the interest of the salmon, petitioners have repeatedly sought relief from the United States Court of Appeals from arbitrary and capricious agency conduct, causing one panel to view them as "partners in the preservation of the [endangered Snake River salmon] species." *PNGC v. Brown*, 38 F.3d 1058, 1065 (9th Cir. 1994).

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[3] *See, e.g.*, *Private ditches put on notice*, METHOW VALLEY NEWS, Oct. 21, 1999.

[4] *See, e.g.*, M. Lee, *Road projects backlog a fishy situation*, TRI-CITY HERALD, June 15, 1999 ("Richland, for example, is trying to get the OK for replacing 10 stoplights . . . a project where few can fathom a connection to fish.")

[5] Citations in the form "ER__" refer to documents from the Administrative Record, which contains roughly 2,000 documents, as presented to the Ninth Circuit as Excerpts of Record pursuant to Circuit Rule 17-1; citations in the form "1995 BiOp" refer to the biological opinion of NMFS on March 2, 1995 (ER51); and citations in the form "Buchal Aff. Ex. __" refer to documents presented in support of petitioners' motion to complete and supplement the record.

[6] Though the Endangered Species Act flatly prohibits interstate trade and commerce in listed species, the United States Court of Appeals for the Ninth Circuit has accepted the Government's representation that the Act is impossible to enforce because it is all but impossible to distinguish listed salmon from unlisted ones. *PNGC v. Brown*, 38 F.3d 1058, 1068 (9th Cir. 1994).

In this case, petitioners seek review of a decision of the United States Court of Appeals for the Ninth Circuit affirming a Record of Decision of the Bonneville Power Administration (BPA). BPA operates a network of dams and reservoirs, along with an electric transmission system, that provides more than half of the electricity supply for the Pacific Northwest.

Because listed fish are present in the Columbia River, BPA has obtained a series a biological opinions from the National Marine Fisheries Service (NMFS), the agency charged by Congress to protect endangered salmon (while at the same time promoting salmon harvesting, *see* 16 U.S.C. § 1801(c)(3)). These opinions, prepared under an atmosphere of extraordinary pressure to remove dams in the Pacific Northwest, overlooked entirely the most significant scientific evidence concerning the effect of the dams on salmon.

The opinions culminated in a 1995 biological opinion concluding that operation of the Federal Columbia River Power System to generate electric power jeopardized the continued existence of three "distinct population segments" of Snake River salmon. NMFS proposed a so-called "reasonable and prudent alternative," setting forth detailed rules for operating the dams that consisted primarily of requiring larger releases of water from upstream reservoirs during the spring, requiring the dam operators to spill water over the top of the dams rather than generating electric power, and reducing substantially the percentage of salmon transported around the dams and reservoirs. NMFS made these recommendations upon an express finding that it had no idea how much salmon mortality actually arose from dam operations, and ignored entirely substantial evidence that the impact of dam operations upon salmon survival amounted to background noise, barely detectable in the face of larger influences.

BPA's response to the biological opinion was extraordinary. BPA expressly found that NMFS' recommendations would reduce salmon survival and waste money. Yet six days after receiving the biological opinion, BPA deferred to NMFS' recommendations, adopting them in the March 10, 1995 Record of Decision now before this Court.

Argument

I. THE NINTH CIRCUIT NEEDS GUIDANCE AS TO THE FUNDAMENTAL PRINCIPLE OF JUDICIAL REVIEW OF AGENCY ACTION: REVIEW IS FOUNDED UPON THE "WHOLE RECORD"

The principal contribution of Western civilization is the ideal of government by law, rather than by the arbitrary dictates of those in power. As laws afford administrative officials more and more discretion, the only way to protect citizens from abuses of such discretion is through careful review of agency action. That cannot occur when, as here, BPA did not produce a complete administrative record that could permit judicial review.

A. The Extraordinary Administrative Process

BPA's § 7 consultation process was influenced by *Idaho Dept. of Fish and Game v. NMFS*, 850 F. Supp. 886 (D. Or. 1994), *vacated as moot*, 56 F.3d 1071 (9th Cir. 1995). In the interval before petitioners succeeded in vacating that judgment, NMFS, BPA, the U.S. Army Corps of Engineers and the U.S. Bureau of Reclamation voluntarily agreed to enter into private discussions with state and tribal harvest management agencies to determine the science and law to be applied to dams. (*See* ER51, at 9) Under the supervision of Justice Department lawyers, and "by agreement among the parties, a formal record of the proceedings was not maintained for most of the events [during the consultations]" (ER52, at 2-1), a increasingly common device that itself portends the decline of administrative law.[7]

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[7] Forecasting these developments, petitioners sued to open the meetings under the Federal Advisory Committee Act (FACA), but a sharply divided panel of the Ninth Circuit denied relief, declaring that the "groups [were] under the ultimate supervision and control of the district court." *ALCOA v. NMFS*, 92 F.3d 902, 908 (9th Cir. 1996), *see also id.* at 909 (Kosinski, J., dissenting) ("If FACA does not apply in this case, it never will"); *cf. Alabama-Tombigbee River Coalition v Babbitt*, 26 F.3d 1103 (11th Cir. 1994) (applying FACA to similar ESA conduct). Foreshadowing its approach to judicial review in this case, the Ninth Circuit affirmed the trial court's refusal to provide any discovery on factual issues whatsoever in the FACA case, deciding the case based upon factual representations of Justice Department lawyers.

The most important of the secret committees was the Biological Requirements Work Group (BRWG); as BPA explained:

> The BRWG was set up as a process for receiving input from the states and Tribes, and emphasis was placed on obtaining that input, with less emphasis on other scientific points of view[8]. *** Most of the concerns with the recommended application of analytical methods and *any discussion of alternative approaches raised by BPA and others were excluded from the BRWG report by the state and Tribal participants* who performed the final report edits.

ER38, at 23 (emphasis added). Having some understanding of what was going on behind closed doors, petitioners put into the administrative record comprehensive written comments with extensive scientific submissions from world-renowed experts in salmon science in an effort to counterbalance the pernicious effects of the BRWG. (ER9; ER24; ER40)

Nevertheless, based primarily upon BRWG recommendations,[9] NMFS articulated a 5-step process for applying the Endangered Species Act to the FCRPS:

> 1. Define the biological requirements of the listed species.
>
> 2. Evaluate the relevance of the environmental baseline to the species' current status.
>
> 3. Determine the effects of the proposed or continuing action on listed species.
>
> 4. Determine whether the species can be expected to survive with an adequate potential for recovery under the effects of the proposed or continuing action, the environmental baseline and any cumulative effects, and

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[8] For reasons explained below, petitioners contend that the "other scientific points of view" referenced by BPA are not "scientific" at all.

[9] According to NMFS, it would apply "the analytical method suggested by the BRWG [as] the *primary method* of determining whether or not the biological requirements of the listed species are being met . . ." (ER36 at 15, emphasis added)

considering measures for survival and recovery specific to other life stages.

5. Identify reasonable and prudent alternatives to a proposed or continuing action that is likely to jeopardize the continued existence of the listed species." (1995 BiOp at 11-15.)[10]

NMFS found that the agency actions proposed in the 1994-98 Biological Opinion represented an improvement in the survival of endangered salmon, but not enough of an improvement "to meet the species' biological requirements." (1995 BiOp at 87-90.) NMFS and BPA thus expanded the § 7 consultations to include not merely the "effects of the . . . action," but also "effects that are, *or with further authorizations and appropriations could be*, within the action agencies' discretion . . ." (1995 BiOp at 13; emphasis added.) In other words, no operational decisions within the administrative discretion of the river operators could meet what NMFS believed were the "species' biological requirements"—acts of Congress would be required for new public works projects.

NMFS also compared the actions proposed by the agencies against a secret draft Recovery Plan for Snake River Salmon BPA had not even seen (ER38 (cover letter)),[11] explaining that it "place[d] particular importance on differences between the proposed action and the Recovery Plan" in drawing conclusions as to whether the proposed action would jeopardize the continued existence of Snake River salmon. (1995 BiOp at 88)

NMFS ultimately relied upon six factors in concluding that "operation of the FCRPS as described in the 1994-98 Biological Opinion is likely to jeopardize the continued existence of listed [Snake River salmon]." (1995 BiOp at 89, 90, 91.)

1) [status of the particular salmon stock]; 2) the fact that the proposed action differs in significant respects from the

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[10] A NMFS participant in the consultations warned that this vague process was the product of a "technical group" focusing on "legal/policy issues outside the technical group's expertise". (ER6, at 5293.)

[11] To this day, more than eight years after the first listings, NMFS has never released a Recovery Plan, or made the requisite findings that such plan "will not promote the conservation of the species", *see* 16 U.S.C. § 1533(f)(1).

> Recovery Plan; 3) the fact that the FCRPS under the proposed action is a major limiting factor in the survival and recovery of these stocks;[12] 4) the fact that life cycle considerations do not predict species' biological requirements will be met; 5) the fact that the proposed action offers only minor survival improvements over recent conditions; 6) the fact that the only way to achieve significant improvements is with long term system reconfigurations. (1995 BiOp at 89, 90, 91)

Thus NMFS proposed a so-called "Reasonable and Prudent Alternative" (RPA) pursuant to § 7(b)(3) of the ESA. The RPA included a number of immediate actions imagined by NMFS to increase survival: decreased smolt transportation, increased spill and increased flow augmentation.

BPA issued its Record of Decision on March 10, 1995, just days after NMFS issued the BiOp. BPA declared:

> As expressed in this ROD, and based upon its biological analyses and review of the science, *BPA believes a different set of actions could more effectively satisfy responsibilities under the ESA.* (App. 26a; emphasis added).

Nevertheless, BPA declared that NMFS' alternative "is a reasonable one for avoiding jeopardy to and facilitating recovery of the listed salmon species." (App. 26a) What explains this surprising result? Petitioners believe it is what is *not* reflected in the administrative record: political interference.

B. Political Interference in the Process

"I would like to be the first Interior Secretary to take out a really large dam."

Bruce Babbitt (1994)

In tandem with the secret BRWG meetings to determine science and law, the Clinton/Gore Administration established a "Memorandum of Agreement on Pacific Salmon Conservation" in

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[12] This "finding" is unsupported, unsupportable, and contradicted by NMFS' own scientists.

October 1994, including a "Pacific Salmon Task Force" to "establish overall policies governing the development and implementation of conservation and restoration plan for Pacific salmon". (ER18, at 2) (Secretary Babbitt signed it himself.) The Justice Department's Administrative Record appears to contain only two items relating to the Task Force (ER17 and ER21).

As set forth in the accompanying Declaration of James L. Buchal, these documents reveal that at least two meetings were held in Washington, D.C. in November to discuss developments in the "Biological Requirements Work Group." The Group even discussed criticism from petitioners about their exclusion from the process and substantive critiques of the work of BRWG (ER17). The documents reveal that future meetings were planned (ER21).

After December 1994, however, the Administrative Record contains no documents emanating from this Task Force, and indeed, almost no evidence of any involvement by officials in Washington, D.C. Yet newspaper accounts reported a continuing involvement by D.C. officials.[13] An article printed the day the BiOp was released reports that the BPA Administrator "was told to cool his rhetoric and 'stop whipping BPA's customers into a frenzy' over possible electric rate hikes to pay for the salmon program."[14] The Administrative Record contains no record of this contact between D.C. officials and the Administrator, *or, indeed, any such contacts.*

Petitioners therefore moved the Ninth Circuit for an order compelling BPA to complete and supplement the record. As a matter of Ninth Circuit practice, which itself frustrates judicial review of agency action, the "Chief Court Mediator" entered an order referring the motion to the merits panel (Order, Sept. 15, 1998). The merits panel denied the motion four days before oral argument, without explanation. (App. 14a.)

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[13] Scott Sonner, *White House weighs role on salmon*, THE HERALD (Feb. 5, 1995); Les Blumenthal, *Departments clash over salmon plan funding*, TRI-CITY HERALD (March 2, 1995); and Les Blumenthal, *Future of wild salmon and the BPA linked, and time is short*, THE NEWS TRIBUNE (March 19, 1995).

[14] Les Blumenthal, *Departments clash over salmon plan funding*, TRI-CITY HERALD (March 2, 1995).

Judicial review based upon such an incomplete Administrative Record violates the rights of petitioners to due process of law. *See, e.g., Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981) ("docketing of conversations between the President or his staff and other Executive Branch officers or rulemakers may be necessary to ensure due process.") It is timely for this Court to affirm that the federal judiciary will not countenance interference with judicial review of agency action.

II. THIS CASE OFFERS AN UNPRECEDENTED OPPORTUNITY TO AFFIRM THE RIGHT OF CITIZENS TO CHALLENGE FEDERAL ENVIRONMENTAL POLICY DRIVEN BY JUNK SCIENCE

"We are . . . worried at the dawn of the twenty-first century, at the emergence of an irrational ideology which is opposed to scientific and industrial progress and impedes economic and social development.

"We contend that a Natural State, sometimes idealized by movements with a tendency to look toward the past, does not exist and has probably never existed since man's first appearance in the biosphere, insofar as humanity has always progressed by increasingly harnessing Nature to its needs and not the reverse. We full subscribe to the objectives of a scientific ecology for a universe whose resources must be taken stock of, monitored and preserved.

"We . . . forewarn the authorities in charge of our planet's destiny against decisions which are supported by pseudoscientific arguments or false and nonrelevant data."

The Heidelberg Appeal (1992)[15]

In *Bennett v. Spear*, this Court advised that § 7 (a)(2) of the Endangered Species Act must be construed "to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." 520 U.S. 154, 176-77 (1997) (noting that this may be the "primary" reason

[15] A copy of this petition, signed by over 72 Nobel Prize winners and 3,000 scientists, may be found at http://www.heartland.org/appeal.htm

for requiring use of the "best scientific and commercial data"). This promise, however, has been undercut by application of *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989), wherein this Court advised lower courts that "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary reviews more persuasive". The lower courts need guidance as to how to evaluate whether the opinions of government scientists are "reasonable." A ringing affirmation that "expert" opinion contrary to empirical data is unreasonable could eliminate hundreds of future ESA lawsuits.

The ESA requires agencies to use the best science in assessing the effect of FCPRS operations. Under § 7(a)(2), "[i]n fulfilling the requirements of this paragraph *each agency* shall use the best scientific and commercial data available" (emphasis added). Agencies cannot lawfully defer to junk science proffered by fish and wildlife agencies; under the express language of § 7(a)(2), it was the duty of *BPA*, not of NMFS, to meet the no-jeopardy requirements. NMFS merely assists in the process.[16] As set forth below, BPA violated its statutory duty by acquiescing in the use by NMFS of data it knew were wrong.

A. Discerning the Best Science from Junk Science

In reviewing the admissibility of expert testimony under Rule 702 of the Federal Rules of Evidence, this Court warned against the gradual dilution of scientific evidence in Federal Courts. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Under Rule 702,

> The subject of an expert's testimony must be 'scientific . . . knowledge.' The adjective scientific implies a grounding in the methods and procedures of science. Similarly, the word knowledge connotes more than subjective belief or unsupported speculation. The term 'applies to any body of known facts or to any body of ideas inferred from such facts

[16] *See also* 50 C.F.R. § 402.15(a) ("Following the issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion").

> or accepted as truths on good grounds.' Webster's Third New International Dictionary 1252 (1986). Of course, it would be unreasonable to conclude that the subject of scientific testimony has to be 'known' to a certainty; arguably, there are no certainties in science. [Citations omitted.] But, in order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method.

Daubert, 509 U.S. at 589-90. What is "the scientific method"? This Court explained that:

> Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human behavior. Green 645. *See also* C. HEMPLE, PHILOSOPHY OF NATURAL SCIENCE 49 (1966) ('[T]he statements constituting a scientific explanation must be capable of empirical test'); K. POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 37 (5th ed. 1989) ('[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability') (emphasis deleted).

Id. at 593. Simply put, factual assertions that are refuted, or falsified, by available data cannot be regarded as "science."

In this case, as explained below, BPA acquiesced in recommendations by the National Marine Fisheries Service that were contrary to the available data. BPA knew that the only rational conclusion to be drawn from the data was that NMFS' recommendations would *decrease* salmon survival, but adopted them anyway. This Court may be reluctant to accept assertions by aluminum companies that fisheries professionals would knowingly recommend a course of action that could only reasonably be regarded as killing fish. Two factors may help explain these extraordinary claims.

First, the Court needs to understand the degree to which the science of biology has departed from the scientific method that has heretofore characterized "science." One law review article promoting the new "science" of "conservation biology" explained:

> A distinguishing feature of conservation biology is that it is mission oriented. Underlying any mission is a set of values. Philosophers of science now recognize that no science is value free, despite all we were taught in school about the strict objectivity of the scientific method. Conservation biology is more value-laden than most sciences because it is not concerned with knowledge for its own sake but rather is directed toward particular goals.[17]

Conservation biologists "view species extinction and loss as a crisis of major proportions that requires a drastic shift in our governing policies."[18] The value-laden nature of conservative biology, exacerbated by its crisis-driven viewpoint, filters out data refuting conservation concerns.

In a time when science, particularly environmental science concerning human impact on the environment, has become strikingly more politicized, it is ever more important that the federal judiciary protect citizens from political appointees manipulating agencies whose conduct is supposed to be constrained by law. Politicians are even beginning to argue that "empirical science" is somehow inferior to "science by consensus,"[19] as if political-style vote of "scientists" overcomes actual data.

Dams are particularly susceptible to political attack:

> In the view of conservationists, there is something special about dams, something—as conservation problems go—that is disproportionately and metaphysically sinister. The outermost circle of the Devil's world seems to be a moat

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[17] R. Noss, *Some Principles of Conservation Biology as They Apply to Environmental Law*, 69 CHICAGO-KENT L. REV. 893, 895 (1994).

[18] R. Keiter, *Conservation Biology and the Law: Assessing the Challenges Ahead*, 69 CHICAGO-KENT L. REV. 911 (1994).

[19] *See* http://sepp.org/misuse/envirltr.html

> filled mainly with DDT. Next to it is a moat of burning gasoline. Within that is a ring of pinheads each covered with a million people—and so on past phalanxed bulldozers and bicuspid chain saws into the absolute epicenter of Hell on earth, where stands a dam. (JOHN MCPHEE, ENCOUNTERS WITH THE ARCHDRUID (1971)).

Technology that improves salmon survival with dams in place is anathema to such conservationists, who have issued blizzards of distortions about the scientific positions of BPA and the dam operators.

The second factor involved in causing the science of dams and salmon to become entirely untethered to data (and indeed reality) is the overwhelming degree to which the overharvest sanctioned by NMFS and State and Tribal fishery agencies is responsible for declines in wild salmon populations. Year after year, these agencies set harvest levels based upon massive hatchery releases, levels less productive wild populations cannot withstand. Nat'l Research Council, UPSTREAM: SALMON AND SOCIETY IN THE PACIFIC NORTHWEST 305 (1996). All over the earth, marketable fish populations are in decline; but in the Pacific Northwest, dams form a scapegoat that distracts attention from enormous fishery agency mismanagement.

B. Scientific Data Does Not Support Agency Assertions Blaming Dams for Salmon Decline, and Agencies Ought Not To Be Privileged to Ignore that Data.

In assessing the effects of dam operations, NMFS and BPA focused on estimates of "total passage mortality." As NMFS explained, "total passage mortality is referred to as mortality from 'passage through the FCRPS' [Federal Columbia River Power System], recognizing that *operation of the FCRPS is only one component of total mortality*." (ER51, at 67-68; emphasis added)

The most accurate estimates of total passage mortality are provided by a University of Washington computer model called CRiSP. (*See* ER51, at 71) CRiSP estimates, for example, that total survival for spring/summer chinook through the entire river system, across eight dams and through eight reservoirs, is roughly 60% (ER32, at 50873).

NMFS and BPA are unwilling to say whether this survival rate is higher or lower than the salmon would achieve in a natural system without the FCRPS. Several independent lines of evidence confirm that the effect of BPA's operational decisions at the dams is *de minimis*.

First, the salmon at issue migrate upstream through up to eight mainstem dams and spawn in the Snake River and its tributaries. Their progeny migrate downstream through the same dams. Salmon produce thousands of eggs; under natural conditions, most of the salmon hatching from these eggs are not, by Nature's design, expected to survive to adulthood. Indeed, over the long run, only two of the thousands of eggs can produce successfully spawning adults, or the world would be swimming in salmon. Natural causes kill nearly all Snake River salmon. *See generally* ER9, at 6-7; ER24, at 5-8 (citing authorities).

Second, comparisons have been made between rivers with and without dams. Both show parallel patterns of decline, leading most researchers to conclude that changes in ocean ecology are responsible for the vast majority of variance in salmon populations. (*See, e.g.*, ER29) Scientific literature suggests that all species of salmon suffer high mortality migrating downstream, ranging from 70-90%, *an amount higher than the mortality Snake River suffer in the FCRPS* (including transported fish). *See generally* ER24, at 5-7 (citing numerous studies). Comparisons have also been made of the number of returning "recruits per escapee" in various river systems, and *there is no difference between the Columbia River and pristine Canadian rivers, also afflicted with declining salmon runs*. (ER27: McNeil, Recruits per Escapee for Columbia Basin Anadromous Salmonids)

Third, and perhaps most compelling, scientists have measured the survival rate per unit distance above the FCRPS and within the FCRPS. The result? There is no difference in survival; "marked cohorts experienced similar survival in undammed and dammed reaches." (ER27: McNeil, "Survival of Marked Juvenile Chinook & Steelhead Migrants in the Columbia River Basin) Mortality caused by the dams cannot be distinguished against the larger background of natural mortality.

These several lines of independent evidence were all ignored entirely by both NMFS and BPA. Though the papers are buried in the Administrative Record, because petitioners put them there, neither the Biological Opinion nor the ROD cite to, refer to, or discuss any such evidence in any way. The Ninth Circuit below did not even mention this evidence, or the agency's duty to consider it, acting as if it could take judicial notice that dam operation decisions doom salmon runs despite contrary evidence. *See also NRIC v. NWPPC*, 35 F.3d 1371, 1375-76 (9th Cir. 1994) (containing extensive recitation of twenty-year-old evidence concerning the impact of dams on salmon, prior to substantial improvements in fish passage facilities).[20]

C. Scientific Data Does Not Support the Operational Changes Demanded by NMFS, and Acquiesced in by BPA.

The Ninth Circuit did address the question of the scientific backing for the operational changes demanded by NMFS, but only at the most general level. The Court characterized petitioners' position as "essentially an effort to rehash the multi-year scientific debate . . ." and declared that "NMFS engaged in a detailed analysis of these issues and weighed the available data." (App. 9a) This position lacks support in the Administrative Record. NMFS overlooked numerous critical issues; where it did "weigh data," it did so by assigning controlling weight to politically-correct "scientific" opinion that was refuted by all available data.

1. Scientific Data Utterly Refutes NMFS' Conclusion that Decreasing Transportation Would Protect Salmon, as BPA Expressly Recognized.

For decades, a large percentage of Snake River salmon have been collected at upriver dams and transported downstream, eliminating exposure to losses from swimming through hundreds of miles of river (and dams). As the National Research Council has pointedly observed: "No investigator to date has provided the

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[20] Petitioners are aware that members of the Ninth Circuit have received education on dams and salmon from self-styled salmon advocates through continuing education programs at the Lewis & Clark Law School in Portland, Oregon; a lawyer for the Northwest Power Planning Council has suggested that the Ninth Circuit Court thereafter adopted the "entire opus" of one of the School's professors. J. Volkman, *Steering by Dicta*, 25 ENV'TL LAW 385, 385 (1995)

Columbia River region with experimental results that demonstrate higher survival of inriver migrants than transported migrants at any [river] discharge level. Until such experimental data become available, transportation should continue to be used."[21]

State and Tribal fishery agencies oppose transportation of smolts. They have employed a variety of fictions in the effort, ultimately developing the FLUSH computer model, which predicts, contrary to all available scientific evidence, that there are little or no benefits to transportation.[22]

The operational changes NMFS proposed in the RPA *decreased* transportation of salmon smolts. NMFS declared that water should be spilled at the projects where salmon were collected for transportation, thereby reducing the number of fish collected. BPA warned NMFS that while it characterized the spill program as "experimental," "the spill operations described are not in an experimental context, particularly with respect to spill at transport projects *where the operation will reduce the number of fish transported, and therefore, fish survival.*" (ER38, at 14) In its ROD, BPA expressly found that "increasing spill at fish transportation projects . . . [is] likely to reduce juvenile survival." (App.29a.)

Other than the State and Tribal biologists and environmentalists, every biologist involved in the consultations advised NMFS that "reducing emphasis on transportation in the Snake River will be counterproductive." (ER19, at 8582) Outside

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[21] UPSTREAM at 253.

[22] The FLUSH model predictions of salmon survival were highly inaccurate, prompting NMFS staff to advise that "failure [of the FLUSH model] to account for results of recent survival studies is a *serious oversight that does not conform with NMFS' obligation to consider the best available scientific information*" (ER39, at 13111 (emphasis added))

Nevertheless, NMFS and BPA relied upon the FLUSH model, with NMFS explaining that because of "differences in 'beliefs' between the state/tribal modeling team and the Bonneville/University of Washington team", NMFS would have to exercise "professional biological judgment." (ER36, at 14) The Ninth Circuit found petitioners' claims about the models "unfounded" because NMFS placed less weight upon the FLUSH model. (App. 10a) But § 7(a)(2) should not be construed to permit BPA and NMFS to give undisclosed "weight" to state and tribal "beliefs" flatly contrary to every bit of available scientific data.

biologists warned of an extensive anti-transportation bias that pervaded NMFS' "scientific" review. (ER10, at 2-6)

BPA's decision to reduce the number of Snake River salmon transported, and hence reduce survival, is arbitrary and capricious not merely as a decision "that runs counter to the evidence before the agency," *Motor Vehicle Mfg. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983), but counter to the agency's own findings. BPA cannot, consistent with its statutory missions to protect fish and generate power, take an action, such as reduced transportation through spill, that it knows will probably kill fish and certainly waste power.

2. Increased Spill Over FCRPS Dams Was Contrary to the Scientific Evidence before BPA

Spilling water, and thus fish, over the top of most of the mainstem dams generally produces less *direct* mortality than other passage routes (except transportation). However, the spill causes very high levels of dissolved gas in the water, which can injure fish. Based upon losses to Columbia River salmon in the 1970s, EPA established a national water quality criterion limiting total dissolved gas (TDG) to 110% of normal saturation.

In the BiOp, NMFS abandoned the 110% TDG standard, declaring that spill would only be reduced "when instantaneous TDG levels exceed 125% of [normal] saturation," or lesser amounts over longer time periods.[23] (1995 BiOp at 106). The best available scientific evidence indicated that this action would affirmatively injure Snake River salmon. Indeed, experts warned BPA and NMFS that "by allowing dissolved gas levels in these rivers to rise above the U.S. EPA guideline, some populations [of anadromous fish] may be lost entirely." (ER45, at 1-2; *see also* ER43) The CRiSP model predicted that spill levels causing the 110% criterion to be exceeded would decrease salmon survival. (ER41; *see also* Buchal Decl. Ex. 4, at 4). NMFS' own scientists had even measured survival *decreases* in 1994 after BPA permitted

[23] NMFS did reference possible spill limitations from the existing 110% TDG state water quality standards, but obtained waivers from those state standards.

additional spill at NMFS' request. (ER40, at 4 (quoting NMFS study)).[24]

BPA warned that an independent Scientific Panel convened by NMFS supported the existing published state and Federal water quality standards of not exceeding 110% TDG for outmigrating smolt and inmigrating adult populations, indicating that "the effects of exceeding 110% is uncertain but in the direction of damage." (ER38, at 11; *see also* ER7, at 52,167 (Scientific Panel also warns that "[m]ore recent reviews suggest that more stringent levels of TDG are advisable for full protection.")).

NMFS proposed to minimize the risks to the salmon through a monitoring program. (BiOp at 110) BPA warned NMFS that it was impossible to use real-time information to protect the salmon against excessive spill. (ER38, at 11) And the smolt monitoring program was such a farce that it provoked Congressional hearings. In 1994, high levels of gas bubble disease symptoms detected in the two-inch fish with 90-100 power microscopes triggered reduced spills, so in 1995, the monitors used 10 power magnifying glasses instead and found no symptoms, despite higher TDG levels.[25]

Petitioners, aided by retired NMFS scientists, have also pointed out for several years that adult fish passage facilities at the dams are not engineered for extreme levels of spill.[26] BPA knew that it was irrational to adopt measures imagined to protect juveniles with known adverse effects on adults. BPA told NMFS that "actions to achieve [improved survival] at each dam *must be studied in context with potential effects these actions may have on reservoir survival and adult passage.*" (ER38, at 8) BPA even chastised NMFS for failing to cite "numerous observations on [problems with adult passage from high spill] that should be cited." (ER38, at 12).

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[24] *See also* Buchal Declaration Ex. 9 (post-BiOp declines in survival from spill).

[25] *Hearing before the Subcommittee on Drinking Water, Fisheries and Wildlife, Salmon Spill Policy on the Columbia and Snake Rivers*, 104th Cong., 33 (June 22, 1995).

[26] *See, e.g.*, Buchal Decl. Ex. 3 ¶¶ 14-16.

Ultimately, however, BPA and NMFS never even attempted to balance potential positive effects on juveniles and negative effects on adults to reach a rational conclusion concerning the overall effects of spill. This renders the ROD "arbitrary and capricious" because BPA has "entirely failed to consider an important aspect of the problem," *Motor Vehicle*, 463 U.S. at 43. It is especially important that BPA consider effects on adults because the adults are the few survivors of the thousands of eggs; loss of adults has a much greater impact on future population size.

3. Scientific Evidence Suggested No Benefits Whatsoever from the Single Most Expensive NMFS Recommendation: "Flow Augmentation"

NMFS also recommended, and BPA acquiesced, in a program of greatly increased "flow augmentation." Under these programs, water is released from upstream reservoirs at times imagined to promote downstream salmon migration—albeit retarding the upstream migration, a factor ignored entirely by the agencies. Although the programs have increased releases steadily since the early 1980s, to the point where millions of acre-feet of water are released annually, *no scientific study has ever found any measurable changes in survival of Columbia Basin salmon from flow augmentation programs.*[27]

BPA objected to flow augmentation in a prior 1993 ROD. (ER1, at 31). BPA even found the program to be counter-productive, in that it "jeopardize[s] efforts to help returning fall adults, which studies show to be at significant risk." (ER1, at 30; *see also* ER2, at 55). BPA "lost" its 1995 findings on the subject.[28]

BPA's views are shared by the National Research Council, which pointed out that it is a "common misperception" in the Pacific Northwest that there have been significant changes in

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[27] The National Research Council has suggested that it would be "logical" to do additional experiments, but "that requires the cooperation of fishery managers, who have too often resisted, fearing that the data would undermine their position in the debate". UPSTREAM, at 352.

[28] A document in the Administrative Record cross-referenced the findings, but the findings themselves do not appear in the index of the Record of BPA filed with this Court. (*See* Buchal Decl. ¶ 12 & ER38, at 28).

Snake River flow associated with salmon decline (UPSTREAM at 193); the Council concluded "the effectiveness of flow augmentation has not been demonstrated" (*id.* at 209). Several independent experts advised BPA that "existing data and scientific analyses do not support flows at the levels called for." (*See, e.g.*, ER44, at 1)

Flow augmentation is the single most expensive component of NMFS' RPA. BPA proposed to spend $142 million acquiring water from the Upper Snake River held in U.S. Bureau of Reclamation reservoirs, thereby burdening ratepayers with the Bureau's ESA compliance costs. (*See* ER50, at 22,456) BPA even proposed to pay Idaho Power Company $10 million to "shape" the release of water from Idaho Power's reservoirs for Snake River salmon, thereby burdening BPA ratepayers with Idaho Power's ESA compliance costs. (*See id.*)

Frank disregard for the enormous costs and non-existent benefits of flow augmentation cannot constitute "a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." *ALCOA v. BPA*, 903 F.2d 585, 598 (9th Cir. 1989) (citation omitted). BPA's duty to provide "economical" power at the "lowest possible rates" is rendered meaningless if BPA is permitted to raise its rates without any reasonable prospect of achieving a countervailing policy objective

4. BPA Relied on a Jeopardy Analysis that Assessed Population Viability In Grossly Defective Ways.

Having listed tiny segments of true "species," NMFS then, through the secret BRWG process, disaggregated the Snake River salmon into 39 even tinier units. As BPA has explained, "[t]he spring/summer chinook ESU is a metapopulation of approximately 39 stocks. Currently none of the life-cycle models simulate the ESU as a metapopulation." (ER38, at 25)

A "metapopulation" is a group of populations which interbreed. In the case of spring/summer chinook salmon, this interbreeding between populations means that one cannot treat the 39 stocks separately, but must take account of the interactions between them. In particular, independent reviewers criticized the BRWG process for failing to discuss "highly relevant information concerning the significance of straying between small salmon

populations in assessing overall population viability. (ER30, at 50890; *see also* ER31, at 50879 (noting "re-colonization [may be] quite likely if one of the stocks should be extirpated"). BPA had available the only model that simulated the spring/summer chinook salmon ESU as a metapopulation using index stock data, and that computer model indicated "*a virtually certain persistence of Snake River spring chinook over the next 100 years . . .*" (ER35, at 14; emphasis added).

The BRWG, however, arbitrarily selected certain of the 39 stocks as "index stocks", developed survival and recovery targets that BPA characterized as "arbitrary and hav[ing] little scientific basis" (ER38, at 23-24), and told NMFS that life-cycle modeling must indicate a "high" probability that salmon populations would be above the "recovery" thresholds in 24 and 48 years in order to permit agency action to go forward.[29] As set forth below, this pseudoscientific approach became the basis for the legal evaluation of whether dam operations jeopardized the continued existence of salmon.

D. This Court Must Act to Protect Citizens Against Government Junk Science.

The net result of the approach to judicial review embodied in the opinion below is that if there are genuine and material issues of scientific fact in a contest between citizens and the government, the Government always wins. This approach is not unique to the Ninth Circuit. *See, e.g., Marathon Oil Co. v. Environmental Protection Agency*, 830 F.3d 1346, 1355 (5th Cir. 1987) (challenges to quality of EPA science are "usually futile"). To adopt this standard of review is to abdicate the judicial role, failing utterly to protect American citizens against those misrepresent science. The government "scientists" know this, are well aware of these decisions, and the scientific process continues to decay.

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[29] This unique approach to evaluating "jeopardy" was specially developed for assessing dam operations—and is so stringent that NMFS cannot apply it in any other context, as for example in numerous biological opinions permitting massive commercial harvest of listed stocks.

III. BPA ADOPTED THE WRONG LEGAL STANDARD TO DETERMINE WHETHER ITS PROPOSED ACTIONS JEOPARDIZED THE CONTINUED EXISTENCE OF SNAKE RIVER SALMON

NMFS' conclusion that dam operations would jeopardize the continued existence of Snake River salmon was wrong, and BPA knew it was wrong. NMFS had interpreted § 7(a)(2) to require BPA to manipulate dam operations so as to assure future recovery of Snake River salmon in the face of overfishing and adverse natural trends, *an impossible task*. Yet BPA acquiesced in the decision, abandoning its proposed action and accepting NMFS' conclusion that the "reasonable and prudent alternative" (RPA) must be adopted to avoid jeopardizing the continued existence of listed species. It is axiomatic that "an order may not stand if the agency has misconceived the law." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

A. The Law

Section 7(a)(2) requires that

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter referred to as an 'agency action') is not likely to jeopardize the continued existence of endangered species or threatened species. 16 U.S.C. § 1536(a)(2).

The applicable Federal regulations declare that agency action "jeopardizes the continued existence of" a listed species when the action "reasonably would be expected, directly or indirectly, to *reduce appreciably the likelihood of both the survival and recovery*[30] *of a listed species* in the wild by reducing the

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[30] In the Federal Register notice accompanying the regulations, NMFS explained that "the word 'both' was added by the proposed rule to emphasize that, *except in exceptional circumstances, injury to recovery alone would not warrant the issuance of a 'jeopardy' biological opinion.*" 51 Fed. Reg. 19926, 19934 (June 3, 1986) (emphasis added). NMFS stated that "[t]he 'continued existence of the species' is the key to the jeopardy standard, placing an emphasis on injury to a species' 'survival.'". *Id.* BPA strenuously objected to NMFS' jeopardy standard for dams on precisely this ground, stating that it "[e]xceeds what is necessary to avoid jeopardy. According to the NMFS/FWS regulations on interagency

reproduction, numbers or distribution of the species." 50 C.F.R. § 402.02 (emphasis added).

Further guidance is found in the definition of "effects of the action," which means:

> the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, *that will be added to the environmental baseline*. The environmental baseline includes the past *and present* impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in progress. 50 C.F.R. § 402.02.

In other words, BPA and NMFS were supposed to determine the incremental effect of the agency action against a baseline, and see whether it "reduces appreciably" both salmon survival and recovery. BPA and NMFS never did, instead adopting the theory that if the salmon were unlikely to recover, BPA was jeopardizing their continued existence, without regard to the effect of anything BPA did. In fact, computer predictions of unlikely recovery were mostly the product of assuming continuing overfishing.[31]

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cooperation, recovery is relevant to a jeopardy standard only if an action makes recovery 'unattainable.'" (ER38, at 2)

As a practical matter, incorporating recovery into the jeopardy standard meant that achieving "no-jeopardy" conditions was impossible: "The fact is that drought and reduced ocean survivals have frustrated attempts to assist salmon recovery." (ER19, at 8582; *see also* ER5, at 52,188 (advising against incorporating recovery criteria into jeopardy analysis)) The opinion below declared, without explanation, that "we find no fault with the method in which NMFS included in the jeopardy calculus the listed species' potential for recovery." App. 10a n.6

[31] BPA and NMFS included in the computer modeling of FCRPS actions extraordinarily high levels of continuing future salmon harvest. NMFS called the "most extreme fishery reduction" inriver harvest rates of 15-36% or even higher, and a 30% drop in the extraordinarily high ocean harvest rates prevailing from 1988-93. (ER33, at 12274-75) Never before has an agency deferred to a finding

B. BPA and NMFS Failed to Make a Reasonable Effort to Identify the Effects of Agency Action.

NMFS correctly noted that:

> Juvenile and adult passage mortality through the FCPRS projects (reservoirs and dams) can conceptually be divided into: natural mortality that would have occurred in the pre-project river; additional mortality due to the existence of the projects; additional mortality that varies with the operation of the FCRPS; and additional mortality from other human activities. (1995 BiOp at 67)

Under the statute and regulations, it is only the "additional mortality that varies with the operation of the FCRPS" that should have been considered in evaluating the "effects of the action," because those are the only effects that will be "added to the environmental baseline" by the agency action. The "environmental baseline" includes natural mortality and mortality arising from existence of the dams.[32]

NMFS complained that its computer models "do not yield mortalities separated into the four conceptual categories described above." (1995 BiOp at 67) Thus NMFS acted as if each and every fish that died in the Columbia River died because of the agency action subject to consultations, repeatedly confusing the agency action subject to consultation with overall mortality. (*e.g.*, 1995 BiOp at 87, 90)

That was gross error. The Corps of Engineers advised that:

> Juvenile salmon mortality values should be reported from other large river systems that are unimpounded, and also shown along with estimated transportation mortalities through the same river reach. The estimated mortality *differences* between total and natural or transportation

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that its own action jeopardized the continued existence of a listed species because excessive hunting and fishing of a "species" is expected to continue in the future.

[32] Effects arising from the *existence* of the dams does not constitute the agency action subject to consultation. Congress did not intend § 7 of the ESA to turn back the clock and require agencies to undo the continuing effects of projects long ago completed. *Sierra Club v. Babbitt*, 65 F.3d 1502, 1510 (9th Cir. 1995) ("Congress did not intend for section 7 to apply retroactively").

> mortality are what should be reported, with appropriate error bounds, as mortality caused by FCRPS operation and other human-caused factors. (ER37, at 13042)

NMFS had even more precise estimates available through CRiSP. While computer models do not produce survival estimates separated into all four of NMFS' conceptual categories, they do produce the only relevant survival estimate: changes in mortality that vary with operation of the FCRPS. Indeed, that is how NMFS was able to conclude that "the proposed action offers . . . minor survival improvements" (1995 BiOp at 89, 90, 91)[33]

Again exhibiting excessive deference to BPA's deference, the opinion below did not address these issues at all, though they were raised below and petitioners strenuously urged the agency to make a rational attempt to discern the "effects of the action."

C. NMFS Blamed the Dams for Everything Wrong with Salmon, and BPA Unlawfully Acquiesced.

One participant warned early in the secret consultations that "there seems to be major confusion" concerning the jeopardy standard, and posed the question whether "the decision [is] based on absolute population status (e.g. overall persistence likelihood), or on changes in that likelihood resulting from the action under consultation?" (ER6, at 5293) That "confusion" was never resolved, as the agencies confounded the "effects of the action" with the needs of the fish in an jeopardy analysis that was arbitrary, capricious, and contrary to law.

Most of the reasons NMFS gave for finding that the dams jeopardized the continued existence of Snake River salmon had nothing to do with dam operations. The precarious status of the stocks is a factor in every § 7 consultation, and here resulted almost exclusively from factors having nothing to do with the dams. NMFS found that "95% in the total reduction in estimated historic abundance of Snake River spring/summer chinook

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[33] It is critical for this Court to understand that the only rational means to assess the effect of FCRPS operations is through computer modeling. Only computers can aggregate the complex positive and negative effects of any particular operational change. *Cf. Sierra Club v. Costle*, 657 F.2d 298, 332 (D.C. Cir. 1981).

occurred prior to the mid-1900s." (1995 BiOp at 3-4) The Snake River sockeye declined in substantial part because the Idaho Department of Fish and Game poisoned their nursery lakes to promote trout populations.[34] And the Snake River fall chinook salmon collapsed after the construction of the (private) Hells Canyon Complex, which blocked migration entirely,[35] and remain subject to extraordinarily high harvest levels.

If federal agency action were held to jeopardize the continued existence of listed species merely because "life cycle considerations do not predict species' biological requirements will be met" (1995 BiOp at 89, 90, 91), any and all Federal agency action with any remote effect on the species, positive or negative, can be barred, based upon the whim of Administration officials. The Ninth Circuit specifically affirmed this position, declaring, contrary to the administrative record,[36] that "the species already stands on the brink of extinction, and the incremental improvements pale in comparison to the requirements for survival and recovery." App. 11a. There is no longer any law in the Ninth Circuit constraining fish and wildlife determinations as to whether public (or private) actions jeopardize the continued existence of listed species. Only political considerations constrain fish and wildlife agency claims.

IV. THIS CASE OFFERS AN UNPRECEDENTED OPPORTUNITY TO PROVIDE GUIDANCE TO AGENCIES ACROSS THE WEST FACED WITH CONFLICTING STATUTORY MANDATES

Although BPA characterized the ROD as a "final decision of the BPA Administrator take pursuant to the Northwest Power Act," BPA offered no explanation in the ROD whatsoever of how its

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[34] Buchal Decl. Ex. 2, at 5

[35] Buchal Decl. Ex. 2, at 9

[36] The only technically competent study of extinction risk in the record, not discussed in any agency decision documents, reports virtually no chance of extinction for the 38 runs of salmon (out of the thousands of populations) listed "*a virtually certain persistence of Snake River spring chinook over the next 100 years . . .*" (ER35, at 14; emphasis added).

decision to adopt the RPA was consistent with its duties under the Act.

The Act directs BPA to "assure the Pacific Northwest of an adequate efficient, economical and reliable power supply", 16 U.S.C. § 839(2).[37] Several other laws, which pursuant to the Northwest Power Act] are all intended to be construed in a consistent manner" (16 U.S.C. § 839[38]), provide further guidance for BPA in performing its statutory obligations to supply electricity. In particular, BPA is directed to minimize expenses incurred in producing electricity, so as to promote the "widest possible use" (16 U.S.C. § 832a(b); *see also id.* § 825s) at the "lowest possible rates to consumers consistent with sound business principles . . ." (*id.*).

BPA is also supposed to carefully consider what adverse impact on salmon is actually caused by power production, because BPA is permitted to fund only those measures which are needed to mitigate adverse effects of the dams. 16 U.S.C. § 839b(h)(8)(B) ("Consumers of electric power shall bear the cost of measures designed to deal with adverse impacts caused by the development and operation of electric power facilities and programs only").

Here, petitioners presented BPA with a precise ranking of salmon recovery measures by cost-effectiveness (ER11), yet BPA offered no explanation of why it chose profoundly ineffective and expensive means of improving salmon survival when cost-effective means were available. BPA has discretion to adopt a less than cost-effective set of means to any particular result, but it would eviscerate the repeated Congressional demands for economy

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[37] BPA knew before it agreed to implement the program that "Fish cost increases required by the 1995 biological opinion probably will add 5 to 10 percent to the rate increase presently contemplated; *clearly putting BPA in the competitive danger zone.*" (ER34, at 11866.) Outside consultants warned that the increased costs could raise rates 10-20% initially, causing customers to flee and ultimately producing rates 60% higher for remaining customers. (ER23, at 9198)

[38] "The purposes of this chapter, together with the provisions of other laws applicable to the Federal Columbia River Power System, are all intended to be construed in a consistent manner. Such purposes are also intended to be construed in a manner consistent with applicable environmental laws." 16 U.S.C. § 839.

in electricity if BPA could adopt expensive and ineffective means without at least explaining the action.

For all one can tell from reviewing the ROD, BPA ignored entirely its statutory duties to provide low-cost electricity. This Court "must find agency action to be in violation of the APA if the agency has 'failed to consider an important aspect of the problem' or has 'offered an explanation for its decision that runs counter to the evidence before the agency.'" *People of the State of California v. FCC*, 905 F.2d 1217, 1230 (9th Cir. 1990) (citation omitted). BPA failed to explain in any respect the balance struck between power and fish.

Where, as here, an agency plainly perceives *and expressly finds* a more effective way to balance its responsibilities, saving the citizens of the Pacific Northwest literally billions of dollars and saving the salmon, Congress cannot have intended to afford the agency sufficient discretion to set that plan aside in favor of politically-correct junk science. Without intervention by this Court, agencies will no longer even make the effort to evaluate "more effective ways" to balance the ESA and their other important statutory missions. They will simply implement without question the will of the political appointees "zealously but unintelligently pursuing their environmental objectives." *Bennett*, 520 U.S. at 176-77.

Conclusion

This Court should not grant review because of the interests of these petitioners in low-cost BPA power. This Court should grant review because the livelihood of hundreds of thousands of mostly rural citizens in the Pacific Northwest depend upon a rational, science-based implementation of the Endangered Species Act, an implementation that cannot be achieved without significant intervention by the United States judiciary. One can only wonder whether anything but the Court's intervention to restore the rule of law to the Pacific Northwest can stem the rising tide of civil disobedience and disrespect for law, as individuals and even

county governments[39] defy federal authority they correctly perceive as arbitrary, capricious, and unconstrained by law.

Respectfully Submitted,

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[39] *See, e.g., Feds tell Elko County to pay up or face lawsuit*, LAS VEGAS SUN, Sept. 2, 1999.